Office - Supreme Court
FILED
MAY 3 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 968

UNITED STATES OF AMERICA,

Respondent,

against

PETER POSTMA and JOSEPH P. McCONNON,

Petitioner.

PETITION OF JOSEPH P. McCONNON FOR A WRIT OF CERTIORARI

Isadore Katz,
Lieberman, Katz & Aronson,
1501 Broadway,
New York 36, N. Y.,
Attorney for Petitioner.

SUBJECT INDEX

PAGE

A—The Opinions of the Court Below 1

B—The Grounds on Which Jurisdiction of this Court is Invoked 2

C—The Questions Presented for Review 3

D—The Statute Involved 4

E—Statement of the Case 5

F—Argument 11

POINT I—The Hobbs Act is void for vagueness under the Due Process Clause of the Fifth Amendment 11

a) The Term "Affects Commerce" is as Broad as Congressional Power to Legislate but Does Not Describe a Prohibited Act 14

b) "Wrongful" as the Critical Word in the Definition of Extortion Has No Clear Meaning 17

c) The Meaning of the Word "Fear" Cannot Be Ascertained from the Statute.. 19

POINT II—Since the substantive crime of the Hobbs Act cannot be committed without cooperative action, there can be no indictible conspiracy under that Act between McConnon and Postma 21

POINT III—There was no proof of a conspiracy between McConnon and Postma 23

POINT IV—The Trial Court erred in failing to charge as requested, that McConnon's guilt must be found only in his intent to join with the conspirators to affect com-

PAGE

merce by extortion, and that his guilt cannot be made to depend upon the purposes of another 27

POINT V—By the use of the scales-of-justice metaphor in his charge to the jury, the Trial Court misled the jury to believe that the Government need only prove its case by a preponderance of the evidence rather than beyond a reasonable doubt 31

POINT VI—The Trial Court erred in denying the motion to exclude from the court room witnesses awaiting calls to testify 33

Appendix A 35

Appendix B 48

Table of Cases

Apex Hosiery Co. v. Leader, 310 U. S. 469 16

Bianchi v. United States, 219 F. 2d 182 20
Burstyn v. Wilson, 343 U. S. 495 17

Callanan v. United States, 223 F. 2d 171 ..... 17, 20
Campagna v. United States, 146 F. 2d 524 ..... 11, 22
Cline v. Frink Dairy Co., 274 U. S. 445 16

Gebhardi v. United States, 287 U. S. 112 ..... 21, 22

Hornstein v. Paramount Pictures, 292 N. Y. 467 22
Hulahan v. United States, 214 F. 2d 441 20

International Longshoremen & Warehousemen Union v. Ackerman, 82 F. Supp. 65 18

Kirschbaum v. Walling, 316 U. S. 517 15

Lanzetta v. New Jersey, 306 U. S. 451 18

McLeod v. Threlkeld, 319 U. S. 491 15

PAGE

Nick v. United States, 122 F. 2d 660 11

Pereira v. United States, 347 U. S. 1 ..... 26, 27
Polish Alliance v. N.L.R.B., 322 U. S. 643 15

Scheppa v. New York, 295 N. Y. 359 .....28, 29, 30

Thornhill v. Alabama, 310 U. S. 88 18

United States v. Cardiff, 344 U. S. 174 ..... 16, 18
United States v. Cohen Grocery Co., 225 U. S. 81 ... 18
United States v. Green, — U. S. — 11, 19, 20
United States v. Kemble, 198 F. 2d 880 .....13, 17, 20
United States v. Local 807, 315 U. S. 521 30
United States v. Reese, 92 U. S. 214 ..... 18, 19
United States v. Varlack, 225 F. 2d 665 .....11, 13, 14, 20

Statutes

Copeland Act, 49 Stat. 979-980, 73rd Cong. 2d Sess. .. 11, 26

Hobbs Act, 18 U. S. C. Sec. 1951 .....2, 3, 4, 5, 11, 12, 14, 17, 18, 19, 20, 21, 22, 26

Labor Management Relations Act, 1947, Sec. 302(a) 29 U. S. C. 186, 61 Stat. 157 23

New York Penal Law, Sec. 851 19

Miscellaneous

77th Cong., April and May, 1942 12

91 Cong. Rec. 11,900, 11,912 ..... 12, 22

6 Wigmore, Evidence, Sec. 1839 (3rd Ed. Supp. 1955) 33

IN THE

Supreme Court of the United States

October Term, 1957

No.

UNITED STATES OF AMERICA,

Respondent,

against

PETER POSTMA and JOSEPH P. McCONNON,

Petitioner.

PETITION OF JOSEPH P. McCONNON FOR A WRIT OF CERTIORARI

To the Honorable, the Justices of the Supreme Court of the United States:

Joseph P. McConnon, by his attorney, Isadore Katz, Esq., respectfully petitions the Court for a Writ of Certiorari to the Court of Appeals, Second Circuit, and in support thereof respectfully shows:

A

The Opinions of the Court Below.

The opinions of the Court of Appeals, Second Circuit, are appended hereto as Appendix A and B; they have not been officially reported.

B

The Grounds on Which the Jurisdiction of this Court is Invoked.

The judgment of conviction for conspiracy to violate the Hobbs Act, sought to be reviewed, was rendered and entered by the United States District Court for the Northern District of New York on April 17, 1956. The judgment was affirmed by the Court of Appeals, Second Circuit, on February 21, 1957. A petition for rehearing was filed on March 8, 1957 and denied on April 9, 1957. In the opinion in which rehearing was denied, the Court below stayed its mandate, pending a timely application to this Court for a Writ of Certiorari, and if such be granted, until final dispositive action by this Court; and in the meanwhile bail was continued.

Petitioner believes that this Court has jurisdiction to review the judgment by Writ of Certiorari under Title 28 U. S. C. Sec. 1254(1); Act of June 25, 1948, c. 646, 62 Stat. 928.

The grounds on which the jurisdiction of this Court is invoked are that the Court of Appeals in affirming the judgment has decided that

(1) The Hobbs Act, despite its vagueness, does not violate the Due Process clause of the Fifth Amendment to the Constitution of the United States. This is a question of federal law not yet, but which should be, settled by this Court;

(2) Under the Hobbs Act, the petitioner, himself an employer-victim of a strike, may be found guilty of conspiring with an extorting labor leader in charge of a strike because, during the strike he acted as intermediary between the labor leader and one of the struck employers, carried messages back

and forth and then, at the request of one struck employer, carried the extortion money to the labor leader. This involves a question of federal law, not yet, but which should be, decided by this Court.

(3) The Trial Court did not depart from the accepted and usual course of judicial proceedings:

(a) In denying a motion to exclude from the court room all witnesses awaiting calls to testify;

(b) In charging the jury, even though by the use of a scales-of-justice metaphor, it supplanted the rule of reasonable doubt with the preponderance of evidence rule;

(c) In refusing to charge the jury to distinguish between the intent, motive and purposes of the petitioner and the intent of the labor leader.

C

The Questions Presented for Review.

1. Is the Hobbs Act so vague and indefinite as to be void for vagueness under the Due Process Clause of the Fifth Amendment?

2. Does the conspiracy provision of the Hobbs Act apply to the petitioner, whose business as an operator of trailerships carrying trucks between Albany and New York, N. Y., was halted by a strike of the truck drivers against trucking companies in Albany, because he acted as intermediary between the struck operators and the extorting labor leader in order to bring about the end of the strike and the resumption of his business?

3. Was there proof of conspiracy?

4. Was it fair to the petitioner to try him on a charge of conspiracy to cause strikes in order to extort money from the struck employers and then convict him on the theory that he had aided and abetted the extorter?

5. Should the Trial Court have charged the jury that the petitioner could not be found guilty of conspiracy unless it was found that he entered into an agreement with the labor leader with the intent to continue the strike until the struck employers paid money under fear of force or violence or threat thereof?

6. Was it prejudicial error for the Trial Court to deny the motion to exclude from the court room all witnesses awaiting a call to testify?

7. By his use of the scales-of-justice metaphor, did the Trial Court, in his charge to the jury, substitute the rule of preponderance of evidence for the rule of reasonable doubt and was this reversible error?

D

The Statute Involved.

SECTION 1951, TITLE 18, UNITED STATES CODE

"Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45. June 25, 1948, c. 645, 62 Stat. 793."

E

Statement of the Case.

In an indictment containing a single count of conspiracy, it was charged that from on or about June 1951 and continuing up to the time of the filing of the indictment, April 1955, Peter Postma and Nicholas Robilotto, two business agents of a local teamsters' union in Albany, New York, and Joseph P. McConnon "did conspire together * * * to

obstruct, delay and affect interstate commerce * * * by extortion"; that it was a part of said conspiracy that Postma and Robilotto would use their positions in the union to obtain $10,000 from twelve trucking companies by threatening and actually causing work stoppages until the payments were made.

No such conspiracy was proved. At the conclusion of the Government's case, the Trial Court granted a motion to acquit Robilotto. McConnon did not testify. Both Postma and McConnon were found guilty by the Jury.

The Court of Appeals said that they were found guilty of conspiring to interfere with interstate commerce by extorting money "under threat of continuing the strike" which, said the Court of Appeals, "is precisely the conspiracy charged in paragraph 1 of the indictment", though the indictment referred to a conspiracy to cause strikes.

Under cover of the indictment, the Government introduced a great mass of testimony of bitter labor negotiations between the representatives of an association of trucking companies and the local teamsters union, beginning in June 1951 when Postma, the chief union negotiator, gracelessly accepted an increase of 13¢ per hour under a wage reopening clause and said, "Next year, when the contract expires in the fall, I will give you a proposal that you cannot accept and when you are in the street, I will jam it down your throat" (58a, 201a, 407a),* and continuing up until the advent of the strike on November 7, 1952 when negotiations for a new contract broke down.

The overwhelming mass of testimony in the case consisted of angry recitations by the employers of the course of these negotiations, the union demands for a new contract which the employers characterized as grossly exorbitant, and the surly manner in which Postma carried on the negotiations.

---

* References in parenthesis are to the printed Appendix filed in the Court of Appeals and in this Court.

McConnon had not the slightest connection with any of these matters of which the employers complained so bitterly. He was himself an employer who operated Trailerships, Inc. in Albany, New York, which transported truck trailers by ship on the Hudson River (150a).

He was not connected with the teamsters' local union nor was he involved in the labor relations or negotiations between the local union and the trucking employers (180a). He solicited business from the trucking employers and maintained warm, friendly and cordial relations, both socially and commercially, before and after his alleged part in the conspiracy, with John J. Vogel, Jr., a trucking employer, the chief government witness.

The strike of the truck drivers necessarily halted the operations of Trailerships, Inc.

The only significant testimony concerning McConnon was given by John J. Vogel, Jr. On November 13, 1952, on the sixth day of the strike, McConnon, who was as much affected by the strike as the struck trucking employers, came to a table in a hotel bar and grill in Albany where Vogel and Mayberry, another trucking employer, were seated. McConnon talked for a few minutes "about why don't we get the strike settled and his Trailerships were not in operation, he was losing money, and that kind of discussion and, as I recall it, he motioned for John Vogel to go out in the hall, he would like to talk to him" (214a). Vogel went with McConnon into the hallway of the hotel where McConnon said, so Vogel testified, "If you will offer the seven points, and $10,000, that Pete will settle the strike" (74a). The seven points referred to union demands concerning wages and fringe benefits.

Vogel said nothing to McConnon but returned to the table and told Mayberry that Postma wanted the seven points and $10,000 (82a). Vogel testified that he was scared, that he was thinking of other struck operators signing "if and when" contracts to get their trucks rolling,

and that he could not stay in business very long if he had to sign the "if and when" contract (79a). Despite such fears, recited as well by the other employers, Vogel and Mayberry, and Dastoli, another trucking employer who joined them at the table, immediately wrote down the seven points in dispute, prepared a list of truckers and the amounts each might contribute toward the $10,000, and then repaired to the truckers' strike headquarters in the hotel where they discussed the matter with a number of operators who were there at the time (83a-90a). "We told them", said Vogel, "the story of what happened and they were willing to go along with it to get the strike over" (91a). Vogel then told McConnon that the operators would pay the $10,000 and McConnon left.

On the next day, McConnon told Vogel, "Nick (meaning Robilotto) then had got his oar in and they wanted $30,000 instead of ten" (92a), which the truckers refused to pay. On Saturday, according to Vogel, McConnon told Vogel that "Pete and they would then take the $10,000", and that "they wanted a small committee and get a separate room" (96a) for a meeting between three union and three employer representatives. The meeting took place that afternoon. McConnon was not present. According to Vogel, there was talk about a union convention, but no talk about the strike for several hours, when suddenly, "I walked over to one side of the room with Postma", and Postma said, " 'That this town is very small and these operators will talk' and I said nothing, and he finally said to me, 'Well, they are all getting theirs, I am going to get mine' " (102a). Vogel and Postma then returned to their seats and in a very few minutes it was agreed to settle the strike on the seven points consisting of a wage increase of 10¢ per hour and certain fringe benefits.

Immediately after the meeting, Vogel began to collect the various contributions from the other truckers. The next day, Sunday, the union membership at a meeting voted to terminate the strike and the trucks began to roll.

On the following Tuesday, without any prior discussion or arrangements, and at a time when McConnon, as was his wont, came to Vogel's office on business, Vogel gave him $7500 "and he could take it to Postma" (193a). On the following Tuesday, again without any prearrangement and at a time when McConnon dropped in to see Vogel on business, Vogel gave $2500 to McConnon for delivery to Postma, together with a list of the contributors. McConnon told Vogel that he had given the money to Postma (114a). Several months later, Postma told Vogel that he had received the $10,000.

Hickey, a Vice-President of the International Brotherhood of Teamsters, testified that about a year later McConnon came to his office in New York and told him about the strike, its effect upon the business of Trailerships, Inc. and that "he became an interested party in trying to solve or settle the strike so the Trailerships could get back in operation" (488a), that he had talked with Postma who agreed that the strike could be settled for a certain amount of money and that he got the money from Vogel and passed it on to Postma (491a).

On this testimony, the Court of Appeals held that, "McConnon intentionally and actively *allied* himself with Postma's effort to shake down the truckers;" that "each knowingly *cooperated* in an effort to *coerce* the truckers, through fear of economic consequence of a continuation of the strike, to pay Postma a sum of money for its termination"; that "the mere fact that a continuation of the strike, directly or indirectly, would work economic hardship, directly or indirectly, on McConnon, did not justify his *cooperation* with Postma in committing an illegal act" (Opinion of the Court of Appeals; emphasis supplied).

In its opinion, denying McConnon's petition for rehearing, the Court held that there was no prejudicial variance between the conspiracy charged in the indictment and the alleged conspiracy found lurking in the testimony to

support the verdict of the jury. "It is true," said the Court of Appeals, "that there was insufficient proof to hold Robilotto and as a result *the conspiracy charged was not proved to have existence until McConnon and Postma began to cooperate in a plan involving extortion*" (emphasis supplied).

Referring to petitioner's complaint that the introduction of the testimony of many bitter employers of prestrike events had prejudiced him, the Court said that, "It was admissible as tending to show that Postma, at and prior to the time when his collaboration with McConnon began, was nourishing illegal designs against interstate commerce of which McConnon was aware." This is a most curious statement for there was absolutely no testimony that McConnon "was aware" of any designs, legal or illegal, nourished by Postma against the operators. The testimony was clear that McConnon had no connection at all with any of the activities of the union or with Postma's activities which led up to the strike. He, like the struck employers, was adversely affected by the strike and, with them, entertained fears of economic loss flowing from the strike. If the crux of the case against him is that he cooperated, the evidence is clear that he cooperated in the same manner that Vogel cooperated to bring about a termination of the strike. His motion for a judgment of acquittal should have been granted.

The petitioner unsuccessfully challenged the fairness at the trial of the refusal of the Trial Court to exclude witnesses awaiting calls to testify from the courtroom while other witnesses were testifying; and made several objections to the failure of the court to charge the jury concerning McConnon's intent and generally excepted to the adequacy of the charge.

F

ARGUMENT.

POINT I

The Hobbs Act is void for vagueness under the due process clause of the Fifth Amendment to the Constitution of the United States.

Though this Court did decide in *United States* v. *Green*, ... U. S. ...., that the Hobbs Act, 18 U. S. C. Sec. 1951, was a valid exercise of legislative power under the Commerce Clause, it has not yet decided whether the Hobbs Act is sufficiently definite and clear under the Due Process clause to survive its tests. The Court below said, rejecting our argument that the Hobbs Act was void for vagueness,

> "The Supreme Court has not yet dealt with the contentions of the appellants here."

A final determination of this important question is peculiarly necessary at this time in the administration of the Act.

In the instant case, the Court below relied upon its prior decisions, particularly *United States* v. *Varlack*, 225 F. 2d 665, in which it had said that

> "The terms of the present statute are no more vague than those of its predecessor."

and cited *Nick* v. *United States*, 122 F. 2d 660, and *Campagna* v. *United States*, 146 F. 2d 524, which had dealt with the constitutionality of the predecessor Anti-Racketeering Act of 1934, the Copeland Act, 48 Stat. 979-980, 73rd Cong. 2d Sess., under the Commerce Clause. But the Hobbs Act differs in many material and significant provisions from its predecessor. Congressman Hobbs, the author of the present Act, declared, during the debates in the House,

> "The reason we left out Section 6 of the Copeland Act is the same reason we left out every word of the

> Copeland Act. We wiped the whole thing out and substituted a bill that cannot be misunderstood." (91 Cong. Rec. 11,900)

The new Act changed the title of the Copeland Act from

> "an Act to protect trade and commerce against interference, threats, *coercion* or intimidation." (emphasis supplied)

to

> "interference with commerce by threats or violence."

The word "coercion" was omitted from the definition of the crime and the gist of the crime was changed to

> "Whoever in any way or degree obstructs, delays or affects commerce * * * by * * * extortion * * *."

Whereas the Copeland Act had defined the word "wrongful", that definition was deleted from the Hobbs Act and now the word "wrongful", pregnant with a variety of meanings, stands undefined in the Act.

Furthermore, the definition of the word "extortion" was changed from

> "obtains the property of another, with his consent, induced by wrongful use of force or fear * * *."

to

> "the obtaining of property from another with his consent induced by wrongful use of *actual or threatened* force, *violence* or fear * * *." (emphasis supplied)

The word "coercion" was omitted from the Hobbs Act because of labor representations at the legislative hearings (77th Cong., Apr. and May, 1942) so as to make clear that the Act was directed at interference with the transportation of goods in interstate commerce and was not intended to impair or affect the right to strike or other rights contained in the federal labor statutes set forth in Section (c) of the Act.

The result of the changes was, we submit, to make the Hobbs Act even more obscure and more vague than its

predecessor had been. It does not contain ascertainable standards of guilt so that men of reasonable intelligence may have fair warning of the prohibited activity. It is because the words "affects commerce," "wrongful" and "fear" are so broad, indefinite and variegated in meaning that men of reasonable intelligence can only guess at their meaning in the statute. Because of the lack of precision in this criminal statute, acts thought to be beyond the scope of the federal authority under the Commerce Clause and within state police power are found to be punishable under the Hobbs Act; labor activity deemed to be protected under the federal labor statutes is presented as being wrongful, see dissenting opinion in *United States* v. *Kemble,* 198 F. 2d 880; and fear of economic loss flowing from strikes is deemed to be the kind of fear envisaged by the Hobbs Act, see *United States* v. *Varlack,* supra and cases therein cited.

Moreover, the lack of clarity in the Hobbs Act permits its extension to conspiracies to "continue strikes" as well as to "cause strikes" as in the instant case, and to reach a "shakedown" to stop a strike, even though this very activity was expressly declared to be beyond the scope of the Act. During the course of the debate on the Hobbs bill in the House, Representative Sumner asked:

> "There have been complaints that in the case of strikes, an attorney has gone in and asked an operator for something like $15,000 or $20,000, as a shakedown to stop a strike. Is there anything in the bill about that?"

Mr. Jennings, one of the Managers of the bill, replied:

> "Not a thing. This does not have a thing to do with strikes." (91 Cong. Rec. 11,912)

a. The Term "Affects Commerce" is as Broad as Congressional Power to Legislate but Does Not Describe a Prohibited Act.

The Act makes it a crime to obstruct, delay or affect commerce by extortion. We are at a loss to understand whether the word "affects" is to be read *in pari materia* with the words "obstructs" and "delays" or whether it stands separate and apart from them and means something more than interference with commerce by obstruction or delay. The term "affects commerce" is used by Congress when it wishes to bring aspects of commerce within its constitutional power and connotes the broad reach of that power. It does not, however, offer any clue as to the nature of the prohibited condition of commerce that may not be brought about by extortion without violating the Act. "Affects" means "influence" and commerce may be influenced adversely or beneficially. The Act gives no indication of whether either or both results are prohibited. One may affect commerce by obstructing it, or delaying it, or restraining it, or controlling it, or monopolizing it, or preserving it, or restoring it, or protecting it. In what sense is it used in the Hobbs Act?

Section (c) of the Hobbs Act surely uses the word "affect" in a sense different from its usage in Section (a). In what sense is it employed in Section (a)?

Because of the difficulty in ascribing a definite meaning to the term "affects commerce", the lower Court had held in *United States* v. *Varlack, supra,* that in a prosecution under the Hobbs Act it is not necessary for the prosecution to prove

> "That it was the purpose of the conspiracy to affect interstate commerce."

This, said the Court, was a matter of law and the only question open to the jury was whether the acts of the defendant constituted extortion. Thus it had become the

practice to try cases under the Hobbs Act as though the crime was the crime of extortion in interstate commerce instead of "affecting commerce by extortion".

Not only does the term "affects commerce" stand undefined in the Hobbs Act but there is no definition of it in any federal act. It is not a term of art and there are no common law precedents to give it content.

It has been difficult enough for this Court to give meaning to the term "affecting commerce" under the Commerce Clause involving the process of adjusting the interacting areas of national and state authority over commerce.

"Precisely the same kind of issues has plagued the two great English-speaking federations," said this Court in *Polish Alliance* v. *N.L.R.B.*, 322 U. S. 643; and, "There is no single concept of interstate commerce which may be applied to every federal statute regulating commerce." said the Court in *McLeod* v. *Threlkeld*, 319 U. S. 491, 495; and "To search for a dependable touchstone by which to determine whether employees are 'engaged in commerce or in the production of goods for commerce' is as rewarding as an attempt to square the circle", warned the Court in *Kirschbaum* v. *Walling*, 316 U. S. 517.

If the term is so difficult of definition when it relates to marking out the constitutional boundaries within which Congress may legislate as to plague two nations and to be equivalent to the futile attempt to square the circle, how can it be deemed sufficiently definite and certain to define a crime? Can it be said that the citizen acted at his peril because he could not in advance resolve this great and historic issue which has plagued two nations? Can it be said that a penal statute whose operation turns upon the determination of such a complex issue as the distribution of governmental power between national and state authorities is sufficiently definite and clear to survive the test of the due process clause? We believe not.

"Affecting commerce" is defined in the National Labor Relations Act, Sec. 2(7), in a most unique and singular fashion admirably tailored to the needs and purposes of that Act but wholly inappropriate to the purposes of the Hobbs Act. Despite the highly specialized definition of the term "affecting commerce" in the National Labor Relations Act, the problem of determining whether the unfair labor practices present in each case affect commerce under that Act has continuously troubled the Board and the courts. In that Act Congress made a finding and declared a policy with respect to labor disputes and their effects upon interstate commerce. No such legislative finding is present in the Hobbs Act. Consequently none of the cases decided under the National Labor Relations Act furnish any guide as to the meaning of the phrase "affects commerce" as used in the Hobbs Act. We submit, therefore, that the term "affects commerce" in the Hobbs Act are words which are vague and fluid and "may be as much a trap for the innocent as the ancient laws of Caligula", *United States* v. *Cardiff*, 344 U. S. 175, 176.

The word "affects" is surely as vague as the word "restrains" and yet it was only because of the common law meaning attributable to the word "restrains" that the Sherman Act was saved from being held void for vagueness, *Cline* v. *Frink Dairy Co.*, 274 U. S. 445; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469.

The more inclusive phrase in the Hobbs Act, "in any way or degree affects commerce", renders the term "affects commerce" even more vague and indefinite, since no citizen could be possessed of such wisdom as to know whether or not his acts would or would not in any way or degree affect commerce.

b. "Wrongful" as the Critical Word in the Definition of Extortion Has No Clear Meaning.

We noted above that the definition of the word "wrongful" contained in the Copeland Act had been deleted from the Hobbs Act. Some effect must be given to this deliberate excision by Congress of a critically important definition of probably the most crucial word in the definition of extortion in the Hobbs Act. In *Callanan* v. *United States,* 223 F. 2d 171, the Court ascribed to the word "wrongful" the same definition which had been stricken by Congress and held that despite the omission, Congress did not intend to change the meaning of the word as defined in the Copeland Act. What was easily determined by the Court in the *Callanan* case presented great difficulties to the dissenters in *United States* v. *Kemble, supra,* in which the dissenters held that the word "wrongful" is not a "term of strong art in the criminal law" and that it includes both public and private wrongs.

"Wrongful" as used in the Hobbs Act is the very essence of the definition of extortion. If this word is obscure, ambiguous or vague, it cannot be said that there is no difficulty in distinguishing the licit from the illicit and hence the statute must fall as a denial of due process.

The test to be applied is the intelligence of common men. It will not do to say that a man of common intelligence knows what "wrongful" means anymore than it is proper to say that such a man knows what the word "sacrilegious" means. "Wrongful" is surely as vague as "sacrilegious" which was explored in *Burstyn* v. *Wilson,* 343 U. S. 495 in an exhaustive search to find its meaning. To search for the meaning of the word "wrongful" must be far less rewarding than a search for the meaning of "sacrilegious" for that which is "sacrilegious" is subsumed under the more inclusive concept of the "wrongful".

The term "wrongful use" in the Hobbs Act is no more definite than the term "unjust rate". Both invite use of

moral concepts and are equally deficient under the requirements of the due process clause. See *United States* v. *Cohen Grocery Co.*, 225 U. S. 81.

The phrase "without just cause or legal excuse", a phrase commonly used in tort law, was held to be too vague in *Thornhill* v. *Alabama*, 310 U. S. 88. The words "wrongful use" are surely no more certain than the phrase "lawful occupation" at which this Court looked askance in *Lanzetta* v. *New Jersey*, 306 U. S. 451, while it struck down the statute on the ground of vagueness and ambiguity because of the use of the word "gang",—a word possessed of a variety of meanings.

> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited." *United States* v. *Cardiff*, *supra*.

Precisely in point is *International Longshoremen & Warehousemen Union of America* v. *Ackerman*, 82 F. Supp. 65, 104-106, in which a criminal conspiracy statute of Hawaii was held to be unduly vague because of its use of the word "wrongful".

Likewise in *United States* v. *Reese*, 92 U. S. 214, a statute penalizing the *wrongful* refusal of an election officer to receive a ballot was declared to be void for vagueness. Said the Court:

> "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could rightfully be detained and who should be set at large."

Section (c) of the Hobbs Act compounds the difficulty. That Section reinforces the labor laws, including the National Labor Relations Act, and that Act sets forth many wrongful acts by labor unions. For example, if a union failed to send the strike notices required by Sec. 8(d) of

the National Labor Relations Act, a strike for higher wages is unlawful and the employer may discharge the strikers. Such a strike could well be deemed to be a wrongful use of threatened force or fear and in violation of the Hobbs Act. Again, a strike is unlawful under the National Labor Relations Act if its purpose is in violation of the secondary boycott provisions of that Act. Would such a strike be a wrongful use of actual or threatened fear under the Hobbs Act?

c. The Meaning of the Word "Fear" Cannot Be Ascertained from the Statute.

The word "fear" is so broad as to be another capacious net such as that condemned in the *Reese* case, *supra.* Fear of what? Unlike the New York statute, Penal Law, Section 851, which defines "fear," the Hobbs Act does not declare the kinds of fear which constitute extortion. During the course of the legislative debates it was repeatedly said by the Managers of the bill that it was intended to fashion the Hobbs Act upon the New York Extortion Statute. But the New York definitions were not included in the Hobbs Act. As a result, and despite the omission of the word "coercion", which had been contained in the Copeland Act, the courts are extending the Hobbs Act to include fear of economic loss whereas it would appear that the Hobbs Act was directed only at fear of force or violence.

This Court seems to us to have at least intimated in *United States* v. *Green, supra,* that the Act does not embrace every kind of fear but rather relates to fear of force or violence alone. This Court, in speaking of the Hobbs Act, said that it was a statute which struck at labor officials who attempt "to get personal property through threats of force or violence."

In showing the relationship between the Hobbs Act and its predecessor, this Court said,

> "The city truckers in the *Local 807* case similarly were trying by force to get jobs and pay from the out of state truckers by threats and violence. *The Hobbs Act was meant to stop just such conduct.*" (emphasis supplied)

We think it is significant that in footnote 7 in the *Green* case, this Court omitted reference to those cases such as *U. S.* v. *Varlack, supra; Bianchi* v. *United States,* 219 F. 2d 182, cert. den. 349 U. S. 915; *Hulahan* v. *United States,* 214 F. 2d 441, cert. den. 348 U. S. 856; *Callanan* v. *United States,* 223 F. 2d 171, cert. den. 350 U. S. 852, reh. den. 350 U. S. 926; in which cases several Courts of Appeals had held that the Act was broad enough to include fear of economic loss as well as fear of force and violence or threats of force or violence. The only case under the Hobbs Act of which this Court took notice in the *Green* case was *United States* v. *Kemble,* 198 F. 2d 889, in which the fear arose because of force and violence. We think the omission of these cases suggests that these cases in the view of this Court extended the ambit of the Hobbs Act. We refer to these cases to show that the word "fear" is too flexible for use in a criminal statute.

Since the word "fear" is so vague, broad, ambiguous and indefinite as to embrace fear of economic loss, though such fear does not seem to be included within the Hobbs Act, we respectfully submit that the use of the word "fear" in the Hobbs Act renders the Act void for vagueness.

In sum then, we submit under this Point that the Hobbs Act contains words and phrases which are so vague, indefinite and uncertain in their meaning that the statute must be stricken down as violative of the due process clause of the Fifth Amendment.

If this Court is of the opinion that the statute is not unconstitutional under the Due Process clause, then we submit that it should be so construed as to exclude fear of economic loss and be limited to fear of actual force and violence or threats thereof.

POINT II

Since the substantive crime of the Hobbs Act cannot be committed without cooperative action, there can be no indictable conspiracy under that Act between McConnon and Postma.

Assuming in this point, *arguendo* only, that McConnon did agree with Postma to affect interstate commerce by extortion, or, to state it as the Court below did in its opinion denying the petition for rehearing, that they agreed to interfere with interstate commerce by extorting money under threat of continuing a strike, we submit that such an agreement between extorter and victim does not constitute an indictable offense under the Hobbs Act. There can be no conspiracy between extorter and victim under the Hobbs Act, which makes the substantive crime depend upon cooperative action, any more that there can be an indictable conspiracy between the raper and his under-age acquiescent victim. Said this Court in *Gebhardi* v. *United States*, 287 U. S. 112:

> "If this (a case involving acquiescence) were the only case covered by the Act, it would be within those decisions which hold, consistently with the theory upon which conspiracies are punished, that where it is impossible under any circumstances to commit the substantive offense without cooperative action the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law * * * or under the federal statute."

It is beyond dispute that McConnon was himself a victim of the strike; his business, like that of Vogel and the other operators, had been interrupted by the strike. He, like Vogel and the other operators, was under the same economic pressure to get the trucks rolling. His purposes and motives were the same as those of the truck operators. Pressure upon them was pressure upon him. The situa-

tion here is analogous to that in *United States* v. *Campagna*, 146 F. 2d 524, in which operators of cinema theatres were subjected to strikes, violence and threats, and this pressure led immediately to pressure upon the distributors of the motion pictures who were in vertical industrial relationship to the operators. There was no direct pressure, violence, threats or other interference with the employment relations of the distributors. It was the distributors who paid the extortion money in Campagna. Surely this Court would not countenance the inclusion in that conspiracy of the distributors who collected the extortion money and turned it over to the extorters! Although McConnon did not contribute a share of the money paid over, McConnon "cooperated" as the medium by which his industrial allies paid over the money just as Vogel also cooperated by collecting the allocated shares of the extortion money from the other struck employers. The government did not indict Vogel, no doubt because of the legal principle set forth in the *Gebhardi* case. It should not have indicted McConnon for he, like Vogel, could not be found guilty of conspiracy with Postma in violation of the Act because he had "cooperated" with Postma in committing an illegal act.

Moreover, during the course of the legislative debate on the Hobbs Act, Congressman Hobbs stated on the floor of the House that the definition of extortion contained in the Bill had been construed many times and "comes from the New York Code" (91 Cong. Rec. 11,900). The New York Act was never intended to embrace an employer-victim. The New York Court of Appeals so held in *Hornstein* v. *Paramount Pictures*, 292 N. Y. 467, 471-472. Since the Hobbs Act is the federal counterpart of the New York Extortion Statute, it must be concluded that the Hobbs Act like the New York Extortion Act does not include the employer-victim within its scope.

In addition, the entire thrust of the Hobbs Act was against the extorting racketeer and not against the

acquiescent employer. The course of the debates in Congress makes this abundantly plain. It was not until Section 302(a) of Labor Management Relations Act, 1947, was enacted that it was made a crime for an employer to pay money to a labor representative. If the view of the Court below is correct with respect to conspiracies in violation of the Hobbs Act, then an acquiescing employer who cooperates with a labor racketeer by paying money over to him to bring a strike to an end may be found guilty for the same activity of a violation of the Hobbs Act as well as of Section 302(a) of the Labor Management Relations Act, 1947. We submit that Congress intended no such result and that the Hobbs Act should be so construed as to exclude McConnon, an employer-victim of Postma's activity, from its scope.

POINT III

There was no proof of a conspiracy between McConnon and Postma.

The indictment alleged a conspiracy between Postma and Robilotto, the two business agents of the local union, and McConnon which originated in a statement made by Postma in June, 1951, that when the labor contract expired in 1952 he, Postma, would present a proposal to the operators that they could accept and "when you are in the street, I will jam it down your throat". At best, this was a threat to force a strike more than one year later. It cannot be deemed to be a threat to obstruct, delay or affect interstate commerce *by extortion*. Nevertheless, under the pretext that this statement in June, 1951 was the point of origin of an unlawful conspiracy, the government introduced over objection, in repetitive fashion, through a succession of bitter witnesses, a mass of highly inflammatory testimony of exacerbated contract negotiations in which the union prepared and presented excessive

demands through the dominant and domineering Postma,—all of which testimony was calculated to, and did, arouse the passionate hostility of the jury. When the government rested it was abundantly clear that Robilotto was involved in no conspiracy as charged in the indictment. He was therefore acquitted on motion by the Trial Court. There remained then only Postma, the sole "conspirator" with whom McConnon could have joined as "co-conspirator".

It is now said by the Court below that the conspiracy was not the one alleged in the indictment. At the trial, however, the government and the Trial Court tried the case on the theory that there was a pre-existent conspiracy between Postma and Robilotto in which McConnon joined after the strike began. There was no such conspiracy for McConnon to join.

The Trial Court refused to acquit McConnon on the theory that "a man becomes a conspirator or a member of a conspiracy or makes a plan which is only in one man's mind and becomes a conspiracy when he has knowledge of it and with a wilful, deliberate, affirmative act upon his part furthers it" (518a). Since McConnon did not testify or offer any testimony, the case against him stood as it did when the government rested and McConnon moved for an acquittal. At this point, it was plain, as the Court of Appeals said in its opinion denying the petition for re-hearing:

> "that there was insufficient proof to hold Robilotto and as a result, *the conspiracy charged was not proved* to have existence until McConnon and Postma began to cooperate in a plan involving extortion." (Emphasis supplied)

The search for the existence of a conspiracy led the Court of Appeals to the conclusion that the only "conspiracy" which could be found to support the judgment came into existence when McConnon and Postma began to cooperate after the strike began. Neither the govern-

ment nor the Trial Court had viewed this cooperation, as the Court of Appeals put it, to be the conspiracy set forth in the indictment. The charge to the jury did not point to this as the conspiracy of which McConnon was accused. Instead the Trial Judge instructed the jury that it could find that McConnon joined a pre-existent conspiracy. Said the Trial Judge in his charge

> "• • • an individual becomes a member of a conspiracy by his intentional participation in it or in his conscious, active cooperation in the furtherance of its purpose. It is not necessary that he be its creator or co-author but it is sufficient if he adopts it as his own. Innocent acts or the performance of normal activities in themselves are not sufficient to establish membership. But it is his knowledge of a wrongful scheme or plan and the intentional participation in it in the furtherance of its objective. (747a-748a)
>
> • • •
>
> "The government contends that in pursuance of this alleged plan or conspiracy that McConnon made or transmitted a demand, or a request, to the effect that the strike could be settled upon the giving of certain points and the payment of $10,000.00.
>
> "The government contends that Mr. McConnon with his knowledge of the existence of the plan or scheme to extort money wilfully, deliberately and knowingly allied himself with it, took an affirmative step to the consummation of the plan.
>
> • • •
>
> "The government claims that Postma, as I understand it, was a member and he allied himself within—with that scheme or plan over a period of time whereas McConnon joined at a later date." (756a)

Plainly the charge to the jury referred to a pre-existent conspiracy which the Court of Appeals now finds did not exist.

It was only after the jury returned its verdict and the case was on appeal that the government suggested that

the conspiracy consisted of the cooperation with Postma by McConnon. If this be the conspiracy relied upon to support the judgment of conviction, then, we submit, there was a grossly prejudicial variance between the indictment and the proof. But more than this, there is no evidence to support the conclusion that there was any agreement between McConnon and Postma. Without an agreement there can be no conspiracy.

Contrary to the opinion of the Court below, there was no evidence that McConnon and Postma "each knowingly cooperated in an effort to coerce the truckers". McConnon did not cooperate in any act of coercion. We note parenthetically at this point that the word "coercion" which had been contained in the Copeland Act, had been deleted from the Hobbs Act. No one testified that any act of McConnon was coercive. If the coercion consisted of the strike, it is clear that McConnon had nothing to do with it but was rather himself a victim of it.

Though the Court below sustained the conviction of McConnon it did so not because there was proof of a conspiracy but rather, as it said, because "McConnon intentionally and actively allied himself with Postma's effort to shakedown the truckers", and because of "his cooperation with Postma in committing an illegal act",—in short, because McConnon aided and abetted Postma in committing the substantive offense defined in the Hobbs Act. This cooperation might have been sufficient to sustain a conviction of McConnon as a principal with Postma had they been indicted for violation of the substantive crime; but this lately conceived theory of the case cannot serve to convict McConnon as a conspirator with Postma. One who aids and abets the commission of a substantive offense may himself be convicted as a principal *but not as a conspirator*. The commission of the substantive crime as an aider, abettor or counsellor is a crime separate and apart from the commission of the crime of conspiracy. In *Pereira* v. *United States*, 347 U. S. 1, 11, the Court said:

> "Aiding, abetting and counselling are not terms which presuppose the existence of an agreement. Those terms have a broader application, making the defendant a principal when he consciously shares in a criminal act regardless of the existence of a conspiracy. * * * Thus, the charge of conspiracy requires proof not essential to the convictions on the substantive offenses—proof of an agreement to commit an offense against the United States—and it cannot be said that the substantive offenses and the conspiracy are identical."

We submit, therefore, that the Court below erred in holding that McConnon was properly convicted of conspiracy upon proof that he aided and abetted Postma in committing an illegal act.

POINT IV

The Trial Court erred in failing to charge, as requested, that McConnon's guilt must be found only in his intent to join with the conspirators to affect commerce by extortion, and that his guilt cannot be made to depend upon the purposes of another.

The heart of this case, insofar as McConnon was concerned, was his intention and purpose in telling Vogel that "if you will offer the seven points and $10,000.00, that Pete will settle the strike", in transmitting the messages between Vogel and Postma, and in carrying, at Vogel's request, the money from Vogel to Postma. The testimony was clear that McConnon made no demand upon Vogel. "There was no demand", said the prosecutor (160a). "He didn't put no demand, he told me what they wanted", said Vogel (164a). Even the Trial Judge agreed that McConnon made no demand (166a).

All of the testimony placed McConnon in close and intimate relation to Vogel and the truckers, his business allies, and in opposition to Postma who, shortly after the

strike, drove McConnon out of business. It was because of the differences between McConnon and Postma in their motives and purposes and in their relationship to the parties to the strike that McConnon requested the Trial Court to charge the jury (McConnon's Requests to Charge, Nos. 16, 18, 23, 26, 27 and 31, 761a and 763a) that his guilt could be found only in his own intent and could not be made to depend upon the purposes of other people, and that in determining McConnon's intent, the jury should consider "his relations with Postma, his relations with Vogel and the other truck operators, what interest he had in causing a strike, the stake he had in the outcome of the conspiracy, the entire sequence of the events and the 'give and take' of the entire situation". These requests were refused. The Court below held in affirming the judgment that

> "Any difference in their motives or in their relationship to the parties to the strike is without significance for present purposes."

The refusal to charge as requested was, we submit, grave error (as indeed was the entire charge which instructed the jury that it could convict McConnon for joining a non-existent conspiracy and also substituted the rule of preponderance of evidence for the rule of reasonable doubt).

The differences in motivation and relationship between the parties are of vital and discriminating significance in this type of case. In a New York case of extortion, the Court of Appeals of New York stressed the very differences that the Court of Appeals deemed here to be of no significance. In *Scheppa* v. *New York*, 295 N. Y. 359, Scheppa and Calabria were indicted on two counts for obtaining money from Ambrogi by means of threats; one for conspiracy and the other for the substantive crime of extortion. At the close of the trial, the *conspiracy charge was dismissed*. Calabria was acquitted and Scheppa was convicted of extortion. The State argued that the two defend-

ants were acting together that is, that they cooperated, each with the same guilty intent. (Similarly the Court of Appeals here based its opinion on the fact that McConnon cooperated with Postma.) The facts showed that Calabria took part in the very conversation in which the threats were made; indeed he talked to Ambrogi out of Scheppa's hearing, elaborated on Scheppa's threatening statements and urged Ambrogi to make the payments demanded. (McConnon talked with Vogel but did not make any threatening statement nor did he urge Vogel to make the payment demanded.) There was no proof that Calabria, to whom the money was paid by Ambrogi, turned it over to Scheppa. (McConnon delivered the money to Postma.) Scheppa contended that if Calabria was not guilty, he could not be found guilty. The Court held that there was a vital difference between the two defendants from which the jury could find that

> "Calabria was acting, not for, or collaborator with, appellant but as a friend of complainant, believing, however mistakenly, that discretion in compliance would serve better than valor in resistance."

Though it might be said here that the jury *might* have found that McConnon was acting for, with and as collaborator of Postma, the question to be decided was whether under the testimony here, such a conclusion could fairly be reached without appraisal of the motives of McConnon and Postma and their respective relationships to the parties to the labor dispute. We respectfully urge that in the instant case, as in the *Scheppa* case, motive and relationship must be appraised even though, to be sure, the result of so doing led to affirmance in the *Scheppa* case and here leads to reversal.

Said the Court in *Scheppa*:

> "Complainant testified that he himself, at least for the time, thought that Calabria's persuasions, unlike the similar urgings of appellant, were spoken out of friendship for complainant. We think the case was

one where jurors might say, that, of the two defendants who urged complainant to part with his money lest he suffer injury, *one had, and the other did not have, a criminal intent.*

"Although both defendants in the present case came to the garage together and each expressed to complainant the same idea—that harm would befall him if he did not suffer the exaction—nevertheless it cannot be said that the evidence is identical as to the two. *Their relations to complainant were different and the jury could draw different inferences as to their motives.*" (Emphasis supplied.)

The *Scheppa* case reveals a more powerfully incriminating charge of cooperation by Calabria with Scheppa than do the facts here as they relate to McConnon and Postma. The difference in motive and relationship was deemed of vital significance in distinguishing between Calabria and Scheppa, and should be so regarded in evaluating the "cooperation" between McConnon and Postma.

If there was evidence from which the jury could have discriminated between McConnon and Postma, then the Trial Court below should have charged the jury to that effect and should not have refused to give McConnon's requested charges.

This Court had held in *United States* v. *Local 807*, 315 U. S. 521, 532-533 in referring to the defendants in that case

"The decision must be made in terms of their motivations and purposes rather than those of the others."

We submit that the refusal of the Trial Jury to make clear the differences between the intentions of Postma and those of McConnon was reversible error.

POINT V

By the use of the scales-of-justice metaphor in his charge to the jury, the Trial Court misled the jury to believe that the Government need only prove its case by a preponderance of the evidence rather than beyond a reasonable doubt.

In the course of the charge to the jury, the trial judge charged the jury on the burden of proof and reasonable doubt and the presumption of innocence. This was immediately followed by an explanation of a method whereby the jury could weigh the evidence and "determine whether or not the evidence produced by the government has established the violation". He then made use of the scales metaphor and said

> "if you determine that the total of the evidence *inclines the scales* to the contention of the Government, then you *would say*, or attach to that evidence, you *could say* it was more weighty and it would be up to you to determine whether or not it is of the character that dispels in your mind any reasonable doubt.
>
> "If, on the other hand, in weighing the evidence the scales are evenly balanced, or they *incline* to the defendants' contention, then you would say that the Government has not borne, carried the weight of the evidence as to the particular item of evidence under consideration, or as to the case as a whole, if you are considering the case as a whole." (750a-751a) (Emphasis supplied)

Judge Frank, who heard argument as a part of the Court of Appeals and participated in the decision but died before the opinion was written, indicated in an informal conference memorandum a disposition to reverse on this point as well as upon another point discussed in our next and final point. It was his view, as it is ours, that the use of the scales metaphor indicated to the jury a modification

of the earlier instructions as to the burden of proof and left it with the impression that a bare preponderance of the evidence would suffice to convict.

The Court below, consisting after Judge Frank's death of Clark, Chief Judge, and Hincks, Circuit Judge, said "in a criminal case, an instruction using the scales metaphor is seldom helpful and usually undesirable but that in the context of the full charge given in this case, we think no fatal misunderstanding resulted." The Court of Appeals sought to show that despite the undesirability of the use of the scales metaphor and despite its lack of helpfulness, a rational analysis of the charge shows that the charge on reasonable doubt remained unimpaired. We submit, however, that it is not a question of whether a printed copy of the charge can be evaluated and analyzed to show that it "gave the impression that to convict it was necessary that the Government's evidence not only should be 'more weighty' but also that it must satisfy every reasonable doubt," but rather whether such a metaphor in a charge to a jury does not have such impact on the jury as to override general instructions of reasonable doubt. Indeed the function of the metaphor is to make clear that which might be too subtle for easy understanding and to give concreteness to the abstract and the general. The tendency of the metaphor is to supplant the general statement it was used to explain.

If, by the use of the scales metaphor, there was a misdirection which the jury might have followed, the error was prejudicial and the judgment should be reversed. We respectfully submit that the jury was misled by the metaphor and that this error was so prejudicial as to require a reversal of the judgment.

POINT VI

The Trial Court erred in denying the motion to exclude from the court room witnesses awaiting calls to testify.

At the beginning of the trial and before any testimony was taken, a motion was made that all witnesses awaiting calls to testify should be excluded from the courtroom. The basis for the motion was, as stated by counsel for one of the defendants, that there were in the courtroom a large number of individuals named in the indictment as witnesses and that their testimony would no doubt be repeated. The motion was made, said counsel, so that, "We won't have a parroting of testimony." The motion was denied, the Court stating, that he had no reason to believe that the witnesses in this case would parrot testimony any more than in any other case.

As stated in the opinion of the Court below, Judge Frank indicated an inclination to reverse because of this ruling. The Court, however, held that the ruling complained of was not erroneous on the ground that the exclusion of witnesses is a matter for the sound discretion of the Trial Court.

We respectfully submit that in this particular case the rule of exclusion invoked by the defendant should have been granted. Wigmore advocates the rule of exclusion as a right, 6 Wigmore, Evidence, Sec. 1839 (3rd Ed., Supp. 1955).

The circumstances surrounding this case were such that sound discretion dictated that witnesses awaiting calls should be excluded. Over three and a half years had expired between the last act of alleged conspiracy and the trial. More than four and a half years had elapsed between the first act of the alleged conspiracy and the trial. It was apparent from the nature of the indictment which comprehended matters occurring over such a long span of time that witnesses could not remain uninfluenced if they heard testimony of other witnesses of events which tran-

spired years ago. Eight government witnesses and a lawyer testified at great length and in great detail to substantially the same effect without serious contradictions of one by another. It was quite apparent that the anticipated parroting had occurred.

The testimony concerned conversations and admissions and involved shades of meaning, innuendo and extremely illusory evidence of an emotional nature. Witnesses recited their fears when they heard of the money demand in almost similar fashion as though they were fulfilling a necessary ritualistic incantation of the requirements to secure a conviction.

We submit that if, as the Court of Appeals below held, exclusion of witnesses in a case such as this is a matter for the sound discretion of the Trial Court, and not a matter of right, discretion was abused in this case.

In further support for the application of the discretionary rule of exclusion, the Court below reinforced its views by reference to the incident involving a news story relating to a threatened government witness, implying that exclusion of witnesses might have subjected them to threats from the defendants. The record in this case contains no evidence that the defendants or any one connected with them made any attempt to approach any of the witnesses or to influence them.

The decision of the Court of Appeals implying that a denial of the motion to exclude witnesses is properly based upon the belief that witnesses will be protected thereby and justice better served is hardly compatible with the necessity of affording a fair trial to the defendants.

Wherefore, petitioner prays that this Court issue a Writ of Certiorari to the Court of Appeals of the Second Circuit to review the judgment against him in this case.

And the petitioner will ever pray, etc.

ISADORE KATZ,
Attorney for Joseph P. McConnon,
Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 48—October Term, 1956.

(Argued November 16, 1956 Decided February 21, 1957.)
Docket No. 24114

UNITED STATES OF AMERICA,

Appellee,

—v.—

PETER POSTMA and JOSEPH P. McCONNON,

Defendants-Appellants,

—and—

NICHOLAS ROBILOTTO,

Defendant.

Before:

CLARK, *Chief Judge,* and
FRANK * and HINCKS, *Circuit Judges.*

Appeal by two defendants from a judgment of conviction in the United States District Court for the Northern District of New York, Stephen W. Brennan, *J.*, based on a

---

* Judge Frank, who participated in the decision of this appeal, died before the writing of this opinion. Although he left no draft of a dissenting opinion, he had indicated in an informal conference memorandum (1) a disposition to reverse on two points which are indicated in the body of this opinion and (2) a view that all other claims of error were without substance.

one-count indictment charging the defendants with conspiring to interfere with commerce, in violation of 18 U. S. C. A. § 1951, by extorting money from trucking companies under threat of continuing a drivers' strike. *Affirmed.*

E. Stuart Jones, Troy, N. Y. (Segal, Dorsman, Soffer & Segal, Albany, N. Y., on the brief), *for appellant Postma.*

Isadore Katz, of Lieberman, Katz & Aronson, New York, N. Y., *for appellant McConnon.*

Richard E. Bolton, Asst. U. S. Attorney, N. D. N. Y., Syracuse, N. Y. (Theodore F. Bowes, U. S. Attorney, and Andrew J. Culick, Asst. U. S. Attorney, N. D. N. Y., Syracuse, N. Y., on the brief), *for appellee.*

Hincks, *Circuit Judge*:

A one-count indictment was returned in April 1955, charging that Peter Postma, Joseph McConnon and Nicholas Robilotto, conspired from June 1951 to April 1955, when the indictment was returned, to interfere with interstate commerce by extorting money from eleven named truckers under threat of continuing a strike. The trial began in April 1956. Robilotto was acquitted by a directed verdict. The other two were found guilty and both appeal.

The Government's evidence showed that a union executive, the defendant Peter Postma, obtained $10,000 to his personal gain from a group of truck operators employing union drivers through threat of causing or continuing a drivers' strike. To carry the shakedown offer to the dealers and to collect the money demanded, Postma used as his go-between the codefendant, Joseph McConnon, manager of a firm engaged in the carriage of truck bodies by water

and hence adversely affected by any strike stopping the movement of the trucks. Because of this interest, McConnon volunteered his services as go-between. Postma availed himself of McConnon's assistance but did not originally solicit it.

The Government presented among its witnesses nine members of the Highway Transport Association of Upstate New York, Inc., which group included many of the general freight haulers in the Albany area. It was shown that in 1951 when Peter Postma bargained for his union, Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, he accepted on its behalf a 13¢ per hour increase from the Association and terminated the bargaining session with a remark that "Next year when the contract expires in the fall, I will give you a proposal that you cannot accept and when you are out in the street, I will jam it down your throat."

In 1952, the bargaining for a new contract commenced with a demanded increase in wages and frings benefits of approximately $1 per hour; a demand which the truckers viewed as exorbitant. Bargaining continued until Friday, November 7, 1952. At a meeting on that date, the truckers offered five "points," including a 10¢ hourly wage increase, each "point" being one of the categories in the package deal demanded by the union, and offered to bargain out the remaining two points. At this stage, when the truckers thought they were close to agreement, Postma unexpectedly refused the offer in a surly manner and departed after stating that the union demanded its original wage package which included a 44¢ hourly increase. That night the strike began.

Subsequent events may best be presented by excerpts from the direct testimony of John J. Vogel, Jr., president of a trucking firm and a member of the Truckers' Association. He testified that on the following Thursday, November 13, when he and another trucker were sitting in the Ten Eyck Hotel grill, in Albany, New York, McConnon

came over to his table and said, "When are you going to get this strike over with?" Vogel replied that he did not know when the strike would end. McConnon left the table and then returned and requested Vogel to accompany him into the hallway for a private conversation. There McConnon said to Vogel, "If you will offer the seven points and ten thousand dollars, Pete [Postma] will settle the strike." Vogel's testimony continued: "When I heard that from McConnon, I was quite scared, and I was thinking about these operators signing these if and when contracts, and I was thinking that we certainly couldn't stay in business very long if we had to sign an 'if and when' contract.

By this reference to an "if and when" contract Vogel referred to those truckers who had agreed with the union, in return for their individual immunity from the strike, that they would accept the terms of the collective bargaining agreement if and when that should finally be reached. The greater the number of truckers who thus obtained immunity from the strike, the greater was the economic pressure on competing strike-bound truckers to surrender to union demands believed to be exorbitant. Surrender to these demands, it was thought, would be ruinous. Yet, because of the competitive pressure from those who had signed the "if and when" contracts, continuation of the strike would also ruin the truckers holding out. It was the fear of economic destruction or injury created by these alternatives which led the truckers to accept Postma's offer to terminate the strike upon a collective bargaining agreement calling for a modest increase in labor costs (the seven points), sweetened by a cash payment to him. That, at least, was a permissible inference from the evidence.

Vogel returned to the restaurant table where he and his colleague discussed the offer and drafted a list of truckers and the amounts each might contribute towards the needed $10,000. Then they went to the Association's strike headquarters in the hotel and discussed the offer with those truckers who were present. The truckers agreed to

accept the offer and Vogel went downstairs and so informed McConnon. On the next day, Friday, McConnon told Vogel the cash requirement had been upped to $30,000. This the truckers refused to pay. On Saturday McConnon called Vogel and they met at the hotel. According to Vogel's testimony, McConnon said that Pete and they would take the ten thousand dollars, and that they wanted a small committee and a separate room. The room was obtained and Saturday afternoon a union committee of three met with Vogel and two other truckers, where, for two and a half or three hours they discussed Postma's trip to a union convention in California. Then Vogel walked to the other side of the room with Postma who said, "This town is very small and these operators will talk." Vogel said nothing. Postma then said, "Well, they are all getting theirs. I am going to get mine." After that they joined the group and Vogel asked if the "seven points" were acceptable. These included the 10¢ wage increase and the fringe benefits offered by the truckers before the strike began which then had been summarily refused by Postma. Without discussion Postma acceded. On the next day the trucks started rolling.

Thereafter, Vogel collected various sums from various truckers and paid $10,000 to McConnon in two installments. After the first installment, McConnon returned with a $500 bill and said that Postma wanted smaller bills in its stead. Vogel could not break it and suggested trying a bank. Later, in various conversations with Vogel, McConnon told him that all the money had been delivered to Postma.

Each defendant questions the sufficiency of the evidence to support his conviction. As we held in *United States* v. *Masiello*, 2 Cir., 235 F. 2d 279, in the situation here presented, as to Postma and McConnon an absence of evidence sufficient to convict one will vitiate the conviction of the other. See also *United States* v. *Austin-Bagley Corporation*, 2 Cir., 31 F. 2d 229.

We turn first to examine the evidence as to the guilt of McConnon. He did not testify or offer any evidence:

as to him the case stands now as it did when the Government rested and McConnon moved for acquittal. See *United States* v. *Calderon*, 348 U. S. 160, footnote p. 164. At that stage, there was evidence before the jury that McConnon, as manager of Trailerships, Inc., for the first time cooperated with Postma after the strike had begun; that he did so at the behest of his employer whose business was adversely affected by the strike; and that McConnon before, during, and after the strike was on friendly terms with the truckers, who were his only customers. His claim, forcefully urged in his opening statement, throughout the trial, in summation and upon appeal is, to quote from his brief, "The evidence clearly established that McConnon did not join the alleged conspiracy but rather that he joined with the strike-bound employers, being an employer himself, to bring about a settlement of the strike by acting as the intermediary between Vogel, one of the struck employers, and Postma, the labor leader in charge of the strike." More simply, he claims that, being himself a victim of the strike, he could not and did not conspire to exploit the strike.

We do not agree. McConnon intentionally and actively allied himself with Postma's effort to shake-down the truckers. Postma was activated by hope of personal gain and perhaps a desire to bring the drivers, whom he represented, back into gainful work. McConnon was activated by a desire for the gain that would result, at least to his employer, from an end of the strike. Any difference in their motives or in their relationship to the parties to the strike is without significance for present purposes. The crucial fact is that each knowingly cooperated in an effort to coerce the truckers, through fear of the economic consequences of a continuation of the strike, to pay Postma a sum of money for its termination. There was evidence enough to establish that fact and to support the verdict of guilt which rested thereon. See *United States* v. *Brandenburgh*, 2 Cir., 146 F. 2d 878, 879. The mere fact that a

continuation of the strike directly or indirectly would work economic hardship direct or indirect, on McConnon, did not justify his cooperation with Postma in committing an illegal act. *R. I. Recreation Center* v. *Aetna Casualty & Surety Co.*, 1 Cir., 177 F. 2d 603.

At to Postma the sufficiency of the evidence is even clearer. There was direct evidence which explicitly traced the fruits of the shakedown into his possession in addition to the proofs of his cooperation with McConnon in the conspiracy to extort. See *United States* v. *Varlack*, 2 Cir., 225 F. 2d 665, 668. As to Postma also we conclude that the conviction was sufficiently proved.

On appeal, as below, the defendants urged that the Hobbs Act is unconstitutional or that in the alternative it must be so interpreted as not to apply to cases in which the only extortion was induced not by fear of force and violence but merely by threat of economic harm. These points have been raised before and have been consistently settled adversely to the appellants. *United States* v. *Varlack*, *supra*; *United States* v. *Masiello*, 2 Cir., *supra*; *Bianchi* v. *United States*, 8 Cir., 219 F. 2d 182, cert. den. 349 U. S. 915; *United States* v. *Dale*, 7 Cir., 223 F. 2d 181, and cases cited therein. On these points we reaffirm our holdings in *Varlack* and *Masiello*. *United States* v. *Green*, 340 U. S. 415 (*sic*!), at most suggests that the Supreme Court has not yet dealt with the contentions of the appellants here.

Because twelve months lapsed between return of the indictment and commencement of the trial the appellants contend that the indictment should have been dismissed. In overruling this contention we do not rely upon the fact that neither defendant had seasonably demanded an earlier trial,* that the trial was at one stage continued two weeks at the defendants' request,** and that as to the merits the defendants were not shown to have suffered prejudice by

---

* *Chinn* v. *United States*, 4 Cir., 228 F. 2d 151.

** See *United States* v. *Provoo*, 17 F. R. D. 183, aff'd 350 U. S. 857.

the delay. We deny the motion on the ground relied on below, viz., that in view of the delay resulting from defendants' motions addressed to the complaint and the pressure of judicial business on the only available judges in the Northern District, the delay was not an unreasonable one. *Compodonico* v. *United States*, 9 Cir., 222 F. 2d 310, 315, cert. den. 350 U. S. 831.

The defendant McConnon moved for a severance on the ground that otherwise he would be prejudiced by evidence as to Postma's improper conduct. The motion was denied and rightly so, we hold. Prejudice was no more likely than in other cases of conspiracy. *United States* v. *Varlack, supra; Robinson* v. *United States*, D. C. Cir., 219 F. 2d 29.

We come now to incidents in the course of the trial which are now charged to constitute reversible errors.

At the beginning of the trial, before any testimony was taken, Postma's counsel moved that all witnesses awaiting calls to testify should be excluded from the court room. After some colloquy † this motion was denied and that rul-

---

† At the start of the trial, the following colloquy took place between Postma's counsel and Judge Brennan:

"Mr. Segal: I move the court that all witnesses be excluded from the courtroom aside from such witness who is to testify.

"The Court: For what reason?

"Mr. Segal: Well, in the back of the courtroom there seems to be a large number of the individuals named in the indictment. Their testimony I assume will be repeated. I feel perhaps if just one witness is in the courtroom, we won't have a parroting of testimony.

"The Court: What was that last?

"Mr. Segal: Parroting.

"The Court: We don't follow that up here in this District very much. We do in narcotic cases, and unless there is some reason for it, and I have no reason to believe that the witnesses in this case will parrot testimony any more than in any other case. This is just an ordinary case. We will try it in the ordinary way. I will deny your request."

ing is now pressed as erroneous. The trial then proceeded: the Government offered as witnesses eight executives of corporate members of the trucking Association and its lawyer, all of whom testified at great length and in great detail to substantially the same effect without serious contradictions of one by another. Although it does not affirmatively appear that all these witnesses were in the court room and heard their predecessors testify, certainly there was no ruling to prevent such procedure and, giving the defendant the benefit of the doubt, we assume that that was just what happened.

None the less, we hold that the ruling complained of was not erroneous.* By a long and unbroken line of federal cases ** it is well established that the exclusion of witnesses is a matter for the sound discretion of the trial court. The same rule prevails, we believe, in a majority of state court jurisdictions. See, e.g., *People* v. *Cook*, 292 N. Y. 185. Although in many cases the exclusion of witnesses is obviously desirable for such effect as it may have to prevent the perjurious parroting of testimony, we think it better to leave the decision to the judge than to adopt a rigid rule requiring exclusion of all witnesses as a matter of right. Not infrequently justice may be better served, we

---

* Judge Frank indicated an inclination to reverse because of this ruling.

** *Holder* v. *United States*, 150 U. S. 91; *United States* v. *Chiarella*, 2 Cir., 184 F. 2d 903, remanded on another ground 341 U. S. 946; *Bromberger* v. *United States*, 2 Cir., 128 Fed. 346; *Powell* v. *United States*, 6 Cir., 208 F. 2d 618, cert. den. 347 U. S. 961; *Kaufman* v. *United States*, 6 Cir., 163 F. 2d 404, cert. den. 333 U. S. 857; *Tinkoff* v. *United States*, 7 Cir., 86 F. 2d 868, 879, mandamus den. 296 U. S. 548; *Hood* v. *United States*, 8 Cir., 23 F. 2d 472; *Witt* v. *United States*, 9 Cir., 196 F. 2d 285, cert. den. 344 U. S. 827; *Lii* v. *United States*, 9 Cir., 198 F. 2d 109; *Mitchell* v. *United States*, 10 Cir., 126 F. 2d 550, cert. den. 316 U. S. 702; *Gates* v. *United States*, 10 Cir., 122 F. 2d 571, cert. den. 314 U. S. 698; *Oliver* v. *United States*, 10 Cir., 121 F. 2d 245, cert. den. 314 U. S. 666; *Reger* v. *United States*, 10 Cir., 46 F. 2d 38.

think, by allowing witnesses to remain in the court room than by relegating them to the public corridors of the court house, where they will be exposed to the possible importunities and threats of hostile parties.* We do not overlook Wigmore's advocacy of the rule of exclusion as of right. 6 Wigmore, Evidence, Sec. 1839 [3rd Ed., Supp. 1955]. Nevertheless, we adhere to the principle underlying the discretionary rule prevailing in the federal courts. And especially in view of the subject-matter of the claim of error next to be discussed (a news story relating to a threatened Government witness) we hold that no abuse of discretion has been shown. In *Charles* v. *United States*, 9 Cir., 215 F. 2d 825, it was held that a refusal to exclude witnesses from the court room in pursuance of a settled practice was error, albeit harmless error, as involving a negation of the discretion resting on the trial judge under federal practice. In this case, we hold that no negation or abuse of discretionary power was shown even though the trial judge may not have spelled out all the considerations pertinent to his ruling.

The defendants further complain of prejudice allegedly resulting from newspaper publicity at the time of trial. Six days after the trial began, they offered articles from local newspapers, published the day before, reciting that a potential witness for the Government had stabbed himself after receiving threats. They moved for a mistrial on the ground that the implications from such stories would seriously prejudice their right to a fair trial. The articles were not received in evidence but the tenor of their content is clear from the headlines which were read into the record in the absence of the jury: "Trucking Witness Stabs Self At Albany"; "Trial Witness Okay After Self Stab-

* In his admonition to the jury at the beginning of the trial, before the motion to sequester witnesses had been made, Judge Brennan had said, "Now one other thing, in this courtroom, as in most of our upstate courthouses, the place is pretty crowded. We don't have any places for jurors, or lawyers, or witnesses, that is, no special place for them."

bing"; "Postma Case Witness Threatened Stabs Self." The trial attorney for the Government, before learning of the stabbing episode, had answered newspaper inquiries by saying that the person involved was a Government witness due to testify the following day. It was altogether clear that the publicity was not due to any misconduct on the part of the prosecuting officers. Even the defendants absolve them from blame but, claiming that prejudice was nevertheless sustained, moved for a mistrial.

Judge Brennan then examined the jurors and discovered that all but two of the regular panel and one alternative had read at least one article about the case on one of the days in question. He then inquired whether that material left any impression with the jurors as to the merits of the case. Being satisfied by their responses that none had been influenced thereby, the judge then admonished the jurors that their decisions must rest wholly on the evidence as received in the court room and said "keep your mind closed to everything outside the courtroom itself." During all of this, the subject-matter of the articles had not been mentioned in the hearing of the jury. The motion for mistrial was denied.

We think that this ruling was well within the range of discretion vested in the trial judge. *United States* v. *Allied Stevedoring Corp.*, 2 Cir., —— F. 2d ——, decided February 4, 1957; *United States* v. *Weber*, 2 Cir., 197 F. 2d 237, cert. den. with comment 344 U. S. 834; *United States* v. *Leviton*, 2 Cir., 193 F. 2d 848, cert. den. with comment 343 U. S. 946. The forceful admonition of the judge distinguishes the case here from *Briggs* v. *United States*, 6 Cir., 221 F. 2d 636, in which no admonition at all comparable had been given. And here the publication was not caused by improper action of Government officers as in *Shepherd* v. *Florida*, 341 U. S. 50, and in *Griffin* v. *United States*, 3 Cir., 295 Fed. 437.

The last claim of error which we shall discuss was raised by the defendant Postma: it was covered by an exception to a portion of the charge included in a passage

which we set forth in the margin.* The defendant argues that the use which the judge made of the scales metaphor indicated to the jury a modification of his earlier, correct, instructions as to the burden of proof and left it with the impression that a bare preponderance of the evidence would suffice to convict. Judge Frank, in his conference memorandum took that review.

In a criminal case, an instruction using the scales metaphor is seldom helpful and usually undesirable. However, in the context of the full charge given in this case we think no fatal misunderstanding resulted. To evaluate correctly this claim of error it must be borne in mind that the passage complained of immediately follows full and unexceptionable instructions as to reasonable doubt, the applicable burden of proof, and the presumption of innocence which

---

* "Now, ladies and gentlemen, following that statement of those two rules, I think perhaps it would be logical if you would say to me, 'Well, how do I weigh evidence; how do I determine whether or not the evidence produced by the Government has established the violation charged in the indictment.'

"Ladies and gentlemen, there is no magical formula by which I can tell you what weight you will attach to any particular bit of evidence. But I can call your attention to several things which you may consider in determining the weight to be accorded to a particular bit of testimony, or to evidence, offered by the witnesses. What it means is evidence which to your understanding carries conviction, carries that weight to it which establishes in your mind the truth of a fact which is under discussion.

"The best way I can tell you how you actually weigh evidence is to imagine scales, and if you determine that the total of the evidence inclines the scales to the contention of the Government, then you would say, or attach to that evidence, you could say it was more weighty and it would be up to you to determine whether or not it is of the character that dispels in your mind any reasonable doubt.

"If, on the other hand, in weighing the evidence the scales are evenly balanced, or they incline to the defendant's contention, then you would say that the Government has not borne, carried the weight of evidence as to the particular item of evidence under consideration, or as to the case as a whole, if you are considering the case as a whole."

was stated to continue "until you are satisfied in your review of the evidence that the guilt of either or both defendants have been established beyond a reasonable doubt." Against this preface we think it reasonably clear that the effect of the judge's comment on the weight of evidence and his use of the scales metaphor was to supplement, not modify, his instructions on the applicable burden of proof. This is suggested by his introductory statement that "following that statement of those two rules [i.e., reasonable doubt and presumption of innocence] * * * it would be *logical*" to discuss the weighing of evidence. The phraseology suggested that the statement of the "two rules" was complete in itself; that the task of weighing the evidence involved a different, subsidiary, concept. If the ensuing discussion were understood to contradict or modify the completed statement of the two rules, it would scarcely follow in "logical" sequence: in that event there would have been no *logic* in the prior meticulous discussion of the burden of proof and reasonable doubt. And, more important, after the introductory comment in the first paragraph in which the scales metaphor was suggested, it was said that if the evidence in favor of the Government preponderates or is "more weighty," then "it would be up to you to determine whether or not it is of the character that dispels in your mind *any reasonable doubt.*" Surely this gave the impression that to convict it was necessary that the Government's evidence not only should be "more weighty" but also that it must satisfy every reasonable doubt. In contrast with this is the next and final paragraph quoted in the margin, in which it was observed that if the scales were in balance or inclined to the defendant's contention, the Government has not "carried the weight of evidence." In this, we discern no reasonably possible implication that the Government might be found to have established its case beyond a reasonable doubt when it failed even to sustain the weight of evidence.

All other claims of error which have been pressed we think so lacking in substance as not to require discussion.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 48—October Term, 1956.

(Petitions filed March 5 and 7, 1957

Decided April 9, 1957.)

Docket No. 24114

UNITED STATES OF AMERICA,

Appellee,

—v.—

PETER POSTMA and JOSEPH P. McCONNON,

Defendants-Appellants,

—and—

NICHOLAS ROBILOTTO,

Defendant.

Before:

CLARK, *Chief Judge,* and HINCKS, *Circuit Judge.*

ON PETITIONS FOR REHEARING

E. STUART JONES, Troy, N. Y., *for appellant Postma.*

ISADORE KATZ, New York, N. Y., *for appellant McConnon.*

PER CURIAM:

Each of the appellants, whose convictions were affirmed by our opinion reported at —— F. 2d ——, petitions for rehearing.

McConnon's Petition

It is now contended that we overlooked McConnon's claim of a fatal variance between the conspiracy charged, which was alleged to have begun on or about June, 1951, and that which the jury found to have been formed when McConnon and Postma began their collaboration in November, 1952. It is true that we did not discuss this contention in our original decision: we thought it too specious to need discussion. For the indictment charged a conspiracy between Postma, Robilotto, and McConnon "to obstruct, delay and affect interstate commerce * * * by extorting from" 12 named members of the trucking industry. It is true that there was insufficient proof to hold Robilotto and as a result the conspiracy charged was not proved to have existence until McConnon and Postma began to cooperate in a plan involving extortion. But because the indictment charged a three-man conspiracy existing between 1951 up to the date of the indictment and the proofs went no further than to show that of the three charged only two were criminally involved in a conspiracy not perfected until 1952, it does not follow that there was a fatal variance: the conspiracy proved fell within the period charged. And a conspiracy to interfere with interstate commerce by extorting money "under threat of continuing a strike" is precisely the conspiracy charged in paragraph 1 of the indictment which named McConnon, along with Postma and Robilotto, as a conspirator.

Nor may McConnon justly complain that he suffered undue prejudice from evidence relating to Postma's declarations and activities prior to the consummation of their joint conspiracy, as proved. Although that evidence was

offered primarily in an effort (which turned out to be unsuccessful) to prove the existence of a conspiracy between Postma and others before McConnon came into the scene, it was also admissible as tending to show that Postma, at and prior to the time when his collaboration with McConnon began, was nourishing illegal designs against interstate commerce of which McConnon was aware. *Heike* v. *United States*, 227 U. S. 131, 145; *United States* v. *Campagna*, 2 Cir., 146 F. 2d 524, 530, cert. den. 324 U. S. 867.

McConnon, in an effort to support sundry other attacks on the validity of his conviction, cites *Pereira* v. *United States*, 347 U. S. 1, 11; *People* v. *Scheppa*, 295 N. Y. 359, 67 N. E. 2d 581; and *Hornstein* v. *Paramount Pictures*, 292 N. Y. 468, 55 N. E. 2d 740. In view of the evidence and the charge in this case, it seems to us abundantly plain that none of the cases cited demonstrates any of the errors which McConnon thinks inherent in his conviction.

Postma's Petition

This petition raises only contentions which we think were adequately discussed and dealt with in our original opinion.

Conclusion

The petitions are both denied on the merits. However, in view of McConnon's expressed intention to apply for certiorari, our mandate as to both appellants will be stayed pending a timely application for certiorari and, if such be granted, until finally dispositive action by the Supreme Court. Meanwhile, as to each, bail may be continued.

FILED
MAY 3 195
JOHN T. FEY, Cle
RICHARD E. BOLTON

No. 968

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

-against-

PETER POSTMA, NICHOLAS ROBILOTTO and JOSEPH P. McCONNON,

Defendants,

PETER POSTMA and JOSEPH P. McCONNON,

Appellants.

BRIEF AND APPENDIX FOR APPELLEE

THEODORE F. BOWES,
United States Attorney for the Northern District of New York, Attorney for the United States of America.

RICHARD E. BOLTON and
ANDREW J. CULICK, Asst.
U. S. Attorneys,
Of Counsel.

UNITED STATES COURT OF APPEALS
FILED
OCT
1956
SECOND CIRCUIT

F. N. SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.

INDEX.

PAGE

Statement of the Case 1
Point I—The verdict is supported by the evidence ... 9
Point II—In the case of the defendant McConnon the evidence was sufficient 16
A. To support the conviction in establishing he joined in the conspiracy in all its aspects and results.
B. To establish the conspiracy alleged in the Indictment.
C. To establish the conspiracy and no inflamatory evidence prejudiced him. The Judge properly charged the Jury.
Point III—The Court did not err in failing to grant McConnon's motion for a severance 26
Point IV—The Court did not err in its Charge with respect to the elements of the crime charged in the Indictment 26
Point V—The Hobbs Act is not unconstitutional, and it is applicable to the facts in this case 27
Point VI—The verdict against Postma is supported by the evidence 28
Point VII—The Trial Judge did not abuse his discretion in denying Defendant's motion for a mistrial on the ground of prejudicial newspaper articles .. 30
Point VIII—There was no error in denying the defendant Postma's motion for a mistrial because of Counsel's remarks upon summation 31
Point IX—Failure to Prosecute 32
Conclusion—It is respectfully submitted that the Judgment of the Court should be affirmed in all respects 33
Appendix 34

PAGE

Bianchi v. U. S., 219 Fed. (2d) 182 ..... 17, 24, 25, 28
Bryan v. U. S., 120 Fed (2d) 843 23
Chinn v. U. S., 228 F (2d) 151 32
Compodonico v. U. S., 222 F (2d) 310, cert. den. 350 U. S. 831 32
Dunn v. U. S., 284 U. S. 390 23
Holland v. U. S., 348 U. S. 121, 139 29
Hulahan v. U. S., 215 Fed (2d) 441 ..... 17, 28
International Longshoremen's and Warehousemen's Union v. Ackerman, 82 Fed. Supp. 65 28
Johnson v. U. S., 318 U. S. 189, 200 24
Joyce v. U. S., 153 Fed (2d) 364, cert. den. 328 U. S. 86 23
Kemble v. U. S., 198 Fed (2d) 885, cert. den. 344 U. S. 893 29
Lewis v. U. S., 11 Fed (2d) 745, 747 20
Local 807 case, 315 U. S. 521, 532 25
May v. U. S., 175 Fed (2d) 1005 22
Nick v. U. S., 122 Fed (2d) 660 17
Palmer v. Hoffman, 318 U. S. 109, 119 24
Prichard v. U. S., 181 Fed (2d) 326 23
Reining v. U. S., 167 Fed (2d) 362, 365 31
Rogers v. U. S., 340 U. S. 367, 375 23
Rowley v. U. S., 185 Fed (2d) 523 31
Steckler v. U. S., 2nd Circuit, 7 Fed (2d) 59 23
West v. U. S., 161 Fed (2d) 452 23
U. S. v. Hood Brown, 2 Cir. decided July 31, 1956 .. 28
U. S. v. Campagna, 146 Fed (2d) 524 ..... 17, 23
U. S. v. Cohen, 145 F (2d) 82, cert. den. 323 U. S. 799 26
U. S. v. Flynn, 2 Cir. 216 Fed (2d) 354 cert. denied, 348 U. S. 909 rehearing denied, 348 U. S. 956 .. 30
U. S. v. Fox, 130 Fed (2d) 56 23
U. S. v. Greene, 350 U. S. 420 ..... 18, 27

PAGE

U. S. v. Griffin, 176 Fed (2d) 727, 731 31
U. S. v. Holt, 108 F (2d) 365 32
U. S. v. Koch, 113 Fed (2d) 982 25
U. S. v. Lotsch, 102 F (2d) 35, cert. den. 307 U. S. 622 26
U. S. v. Manton, 107 Fed 834, 839 28
U. S. v. Masiello, Fed (2d) (2nd Cir) decided July 8, 1956 ..... 14, 17, 25
U. S. v. Miller, 24 Fed (2d) 353 24
U. S. v. Monroe, 164 Fed (2d) 471, 474 ..... 23, 24
U. S. v. Patten, 226 U. S. 525 33
U. S. v. Perlstein, 126 Fed (2d) 879, cert. den. 316 U. S. 678 18
U. S. v. Provoo (D. Md) 17 F. R. D. 183, affirmed 350 U. S. 857 32
U. S. v. D. Rhee, 159 Fed (2d) 818 25
U. S. v. Schneiderman, 106 Fed. Sup. 892 25
U. S. v. Stoeher, 100 Fed. Supp. 143; 196 Fed (2d) 276 31
U. S. v. Teoni, 100 Fed (2d) 401, 403 25
U. S. v. Tereira, 347 U. S. 1 25
U. S. v. Varlack, 225 Fed (2d) 665 ..... 17, 27, 33
U. S. v. White, 223 F (2d) 674; cert. den. 350 U. S. 888 32

STATUTES

Section 1951, Title 18, U. S. C. 2
Federal Rules of Criminal Procedure—Rule 30; Rule 52-A; Rule 52-B 24
Section 186 Title 29, U. S. C. 29